In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al.,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

LOUIS P. BERGNA, et al.,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

Respondents' Reply to the Brief of the United States as Amicus Curiae

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INTRODUCTION

Though the Government's brief on the merits[1] differs with Respondents on matters of constitutional analysis, it squints in the same direction: searches, whether or not pursuant to warrant, must ultimately be judged by a standard of reasonableness, which is a

1. The United States agrees that the award of fees was proper (*see* Brief for the United States as *Amicus Curiae* (hereafter "U.S. Brief") at 44-54. As its conclusion and reasoning concur with ours, we do not comment further.

function of the facts and circumstances and which is more rigorous when First Amendment interests are concerned. This search, the Government agrees, is not exempt from judicial review for reasonableness and may well be unreasonable.

The United States, like each set of Petitioners and each of their supporting *amici*, is principally concerned with the consequences for law enforcement of a *per se* rule which prohibits *all* searches of "third parties" absent a showing of impracticality, which it fears will require an additional showing, in *every* warrant application, of probable cause to believe that the party to be searched has committed a crime. While we do not concur in the Government's catalogue of practical or conceptual difficulties with the District Court's view of the police power to search non-suspects, we have not thought the issues presented by *this* case on *this* record to be nearly so broad. Thus, although we believe the courts below took the correct view of the matter, our submission in this Court is, as we frankly acknowledged, somewhat narrower.

Accordingly, as we shall show, our differences with the Government's view of this case lie almost entirely beyond the issues which, as we have conceived and tendered them, are appropriately and necessarily presented in the posture of this case. Such differences as are germane to those issues relate, as we view them, to an argument for a revised *opinion* rather than for a different *judgment*.

I.

SEARCHES OF NEWSPAPER OFFICES

As noted, the Government's concern is for the practical implications of a *per se* prohibition against searches of non-press third parties. Recognizing that this case involves a search directed against a newspaper, the United States acknowledges that "protection of First Amendment liberties is an important element of the law of search and seizure" (*id.*, at 32) and that "where a search of newspaper offices is contemplated, the readily identifiable

First Amendment interests involved are entitled to thorough consideration." *Id.* Different and more exacting standards apply when First Amendment interests are involved as well as Fourth Amendment privacy interests. *Id.* Thus a magistrate "may and should consider a number of factors" before authorizing a search, not the least of which is "the necessity for proceeding by search rather than by available alternative means that may be less intrusive on interests of privacy or freedom of expression." *Id.*, at 34. A magistrate "may, before authorizing a search, require a showing that the desired material cannot safely be sought by less intrusive means." *Id.*, at 36. And in some cases—perhaps this one—a reviewing court may "find that the search of [a newspaper's] offices, though authorized by warrant, was unreasonable, *either because the warrant did not contain the necessary restrictions on the manner of its execution or because under the circumstances no search should have been permitted at all.*" *Id.*, at 43 (emphasis added).[2]

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2. It is odd that, having said this much, the Government refrains from endorsing the analysis in Part I of our brief. Apart from differences as to the applicability of prior cases which we had thought pertinent, the core of the Government's disagreement appears to be a concern that

> "adoption of the 'subpoena first' rule, modified to apply only to searches of media offices, would represent a judicial endorsement of two classes of First Amendment freedoms, one designed for the majority of American society and one tailored specially for the press." *Id.*, at 38.

This concern is unfounded. Indeed, it is flatly inconsistent with the earlier discussion, referred to above, in which the Government concedes (*see* U.S. Brief, at 32-34) that more exacting procedural standards apply when First Amendment interests are affected. *See, e.g.*, Respondents' Brief, at 14-15 and cases cited.

Reference to cases such as *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post*, 417 U.S. 843 (1974) confuse cases involving matters of *procedure*—in which the presence of First Amendment interests historically merits greater care—with cases in which a special *substantive* benefit or exemption is claimed in the name of the First Amendment. Cases in the latter category unquestionably have tended to reject the claimed exemption or benefit. Thus the press must comply with labor laws, antitrust laws, nondiscriminatory tax laws, and the like, and enjoys

Of greatest significance is the total absence of any contention that the decision below, as applied to searches of newspaper offices, would infringe legitimate law enforcement interests. Not a single word of the Government's brief supports any of the concerns posed by petitioners—concerns which, without refutation, we have shown to be chimerical. *See* Resp. Brief, at 32-37. Indeed, the Government's concession is made explicit, with the candor appropriate and fitting for a brief submitted by the United States as *amicus curiae:*

> "In light of the policy determinations underlying the guidelines and the history of relevant federal practices, it can fairly be supposed that *federal law enforcement efforts would not be seriously hampered by a decision of this Court approving the 'subpoena first' rule of the courts below in the limited context of searches of the press* as a neutral 'third party' believed to be in possession of evidence bearing upon a criminal investigation." *Id.*, at 33-34 (emphasis added).

No party, no commentator, and no *amicus* has offered a convincing suggestion to the contrary. Except in rare cases where a

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no broad constitutional privilege against testifying pursuant to a valid subpoena. *See Branzburg v. Hayes,* 408 U.S. 665, 683-84 (1972). But cases involving questions of procedure which affect First Amendment rights—in contrast to substantive questions—unhesitatingly have treated the press and others engaged in First Amendment activities as inherently different and have insisted upon compliance with more exacting procedures than those applicable to the public generally. *See, e.g., Speiser v. Randall,* 357 U.S. 513 (1958); *Smith v. California,* 361 U.S. 147 (1959); *Marcus v. Search Warrant,* 367 U.S. 717 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1968); *Blount v. Rizzi,* 400 U.S. 410 (1971); *Heller v. New York,* 413 U.S. 483 (1973); *Roaden v. Kentucky,* 413 U.S. 496 (1973).

These cases simply foreclose the suggestion that, when it comes to ascertaining the appropriate procedures by which the laws of government will touch some of its citizens, newspapers must be treated no differently than anybody else. Indeed, the United States has embodied this traditional view into its own practices with respect to subpoenas by imposing substantial fetters on the power of United States Attorneys to issue subpoenas directed at the press which are not applicable to subpoenas of other citizens. *See* 28 C.F.R. § 50.10 (1976), discussed in U.S. Brief, at 33.

subpoena would genuinely be impractical,[3] there is no justification for a procedure which works a serious injury upon the public press for no tangible benefit. Though the cost to the free flow of ideas may not be capable of precise measurement, no fair-minded person could say—and certainly the United States does not say (*see* U.S. Brief, at 40-41)—that the allowance of newspaper office searches will not do substantial damage to First Amendment interests. With no countervailing interest to tip the scale, the practice is properly condemned.

II.

SEARCHES OF NON-PRESS THIRD PARTIES

Although we do regard the District Court's opinion as correct, the defense of its judgment does not compel us to defend the broadest application of its opinion to facts not conceivably presented on this record. The thrust of the Government's brief is an argument for a revised opinion. We shall confine our response to a defense of the position we have taken in this Court on the merits. An examination of that position will reveal that the Government has little quarrel with our view of this case.

We have earlier summarized our submission as follows:

> ". . . . The search for evidence in this case was unreasonable, and therefore condemned by the Fourth Amendment, because

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3. The Government suggests (U.S. Brief, at 40 n. 14) that the existence of a state shield law might be thought to render a subpoena "impractical," at least where actually invoked to resist production. We strongly disagree.

A search of a press office may, of course, be conducted where the magistrate finds that a subpoena would be impractical. Such a showing, as the courts below made clear, is made where there is an unavoidable risk of destruction; certainly, there could be other situations of impracticality as well. But it cannot be the law that the State may unilaterally disable itself from proceeding by the less burdensome and constitutionally preferred means of subpoena, and thereafter claim that subpoenas are "impractical" because state law empowers the recipient to resist. Such a rule would produce the anomalous result that a State without a shield law designed to protect the confidentiality of press files could obviously not search a newspaper office but a State with such a law would be free to do so.

it was directed at a party not suspected of crime, and the evidence presented to the magistrate affirmatively showed that (1) the third party to be searched occupied no relationship to any criminal suspect such as would suggest a risk that the evidence might be destroyed; (2) there was no likelihood of destruction arising from the third party's status, demonstrated behavior, or the circumstances by which the evidence sought came to be in its possession; (3) lawful grounds might have existed to resist compelled production of the evidence sought; (4) particularly sensitive privacy interests of the third party (and of others whose confidences were likely to be reflected in documents in its possession) were invaded by a peculiarly intrusive form of search; and (5) there was otherwise no apparent reason shown why a subpoena would be impractical." Resp. Br., at 41.

Admittedly, that is a narrower stance than the broadest reading of the District Court's opinion. No apology is necessary. Four years of reflection, aided by several law review commentaries and the briefs of opposing counsel and *amici,* have revealed questions which a *per se* prohibition of third party searches would pose—questions not appropriately answered upon a record which simply does not present them. It is, moreover, difficult to find bright-line rules in Fourth Amendment jurisprudence. *Cf. Chambers v. Mississippi,* 410 U.S. 284 (1973); *Barker v. Wingo,* 407 U.S. 514, 521-30 (1972). Ultimately, "[t]he test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts." *South Dakota v. Opperman,* 428 U.S. 364, 373 (1976) *quoting Coolidge v. New Hampshire,* 403 U.S. 443, 509-10 (Black, J., dissenting). *See* Resp. Br., at 41-42.

For those reasons, our submission is simply that, for the reasons summarized in the passage just quoted, the search of the *Daily* was unreasonable. The five factors meet, we submit, every objection and concern advanced by Petitioners, their *amici,* and the United States (*see* U.S. Brief, at 21-32) against the broader formulation of the District Court:

(1) The Government contends that there may be a problem in classifying persons as suspects or nonsuspects, and suggests that it might be held that a nonsuspect is anyone "as to whom there is no probable cause to believe he or she is criminally implicated." *Id.* at 23. The solution, the Government suggests, is "that the third party concept be strictly limited to persons or organizations indisputably free of any culpable connection with the offense or relationship to possible offenders." *Id.* at 23. Respondents' formulation unquestionably does just that. *See* Resp. Brief at 48-49. Where the evidence submitted to the magistrate shows that the third party is unrelated to any suspect, has a relationship to the offense and offender of distance and non-involvement (such as a doctor, a bank, a credit bureau, or a newspaper), and has no reputation suggesting a want of integrity or disinclination to comply with law, this standard is surely met.

(2) The same is true of the expressed concern that

> "the use of subpoenas that the courts below would require might well result in premature notice to a guilty individual. Police may wish to inspect the premises or property of so-called third parties, not themselves suspected of any complicity in the unlawful conduct under investigation, but known to be related to, or friendly with, the likely perpetrator." U.S. Brief, at 23-24.

Again, a showing that the third party is indisputably disinterested and law-abiding provides satisfactory assurance.

(3) It is said that the police may desire to search areas "to which a criminal suspect has . . . ready access" (*id.,* at 24)—presumably a problem because, following service of a subpoena, the suspect may enter and destroy the evidence. In such a case, if no practicable means to safeguard the evidence in the interim is available, a subpoena would be impractical and, under the District Court's opinion as well as our submission, the premises could be searched.

(4) A fourth fear is for the situation in which "the probable reaction of such third parties to a subpoena . . . is unknown and unknowable . . . ." *Id.* Here, a showing that there is "no likelihood of destruction arising from the third party's status, demonstrated behavior, or the circumstances by which the evidence sought came to be in its possession" (Resp. Brief, at 41) provides the answer. Cases where the answer is truly "unknown and unknowable" may be saved for another day, on a record where that uncertainty in fact exists.

(5) The Government says that the District Court's rule, broadly read, will require a showing on each search warrant application that the person to be searched is a suspect. That requirement in no way follows from our view of the case, for we have said only that a search becomes unreasonable where the evidence actually presented to the magistrate affirmatively shows that the third party is not suspected of crime. *See* Resp. Brief, at 41.

(6) The Government suggests that the opportunity afforded by a subpoena—admittedly "valuable in cases where the subpoenaed party can make a convincing showing that he does not possess the requested materials or that they are subject to some overriding privilege" (U.S. Brief, at 27)—may delay a criminal investigation. The importance of this right is extensively demonstrated in Respondents' Brief, at 25-31, 45-48. The danger of delay occasioned by a pending motion to quash cannot be substantial; courts are not powerless to summarily deny an ill-founded motion, and there surely can be no virtue in a process which overcomes a well-taken claim of privilege by acting peremptorily before that claim can be judicially determined.

Consideration of these several expressed concerns demonstrates that in this case, there was no reason to proceed by search warrant and sound reason to declare it unreasonable. The Government strikingly refrains from defending either the search in this

case or contesting Respondents' statement of principles by which it ought to be condemned. Arguing only against a *per se* rule which defense of the judgment below does not compel us to support, the Government candidly concedes a great deal:

> "We do not mean by the foregoing to suggest that law enforcement authorities should be in any way discouraged from using subpoenas where feasible, or that there are no valuable interests that are served when a subpoena is used rather than a search, or even that there may not be occasions on which it would be appropriate to refuse issuance of a search warrant because it is unreasonable to proceed by those means rather than by subpoena or even a request for voluntary cooperation. One undeniable benefit of a subpoena, whenever prompt compliance is forthcoming, is that it avoids the necessity for police rummaging that may disclose private materials not subject to inspection or seizure under the terms of the warrant. (In many cases a police request for voluntary production at the time the warrant is served could accomplish the same objective, but that will not always be so; here, for example, it appears that the photographs might not have been producible because they did not exist at the time of the search.)
>
> Another cited benefit of the use of the subpoena is that it affords the third party an opportunity to litigate his obligation to supply the requested materials. We recognize that this may be valuable in cases where the subpoenaed party can make a convincing showing that he does not possess the requested materials or that they are subject to some overriding privileges, such as the attorney-client privilege, that shields them from production even though they may contain evidence of a crime." *Id.*, at 26-27.

Against these conceded interests, the Government has arrayed no objections, other than those which we have shown to be inapplicable to the formulation which we submit governs this case. Indeed, the Government forthrightly concedes that a rule

forbidding unreasonable third-party searches poses little threat to law enforcement:

> "It is, moreover, in the nature of things that unnecessary or unjustifiable searches of truly disinterested third parties are rare. We canvassed a number of federal prosecutors' offices in connection with the preparation of this brief and were consistently told that there is a strong preference for proceeding by subpoena or, better yet, by informal request rather than by search whenever it appears feasible to do so (which is almost always in the case of indisputably disinterested third parties such as banks or telephone companies). This prefence [sic] is predictable and understandable in light of the fact that the warrant mechanism is relatively cumbersome and demanding and that searches perceived as unnecessary by the citizenry can be destructive of police-community relations—considerations that make law enforcement officials unlikely to seek a warrant in the first instance unless they have some reason to fear that less drastic measures will prove inadequate." *Id.*, at 22.

III.

NECESSITY OF A REMAND

The United States agrees that under its approach, the *Daily* search might well have been unreasonable "either because the warrant did not contain necessary restrictions on the manner of its execution or because under the circumstances no search should have been permitted at all." *Id.*, at 43.

If this Court thinks that the question of reasonableness cannot be determined on this record without a further hearing, we would not oppose a remand. But, for several reasons, it does not seem to us that additional proceedings are necessary.[4]

4. We do not understand the Government's suggestion that, on remand, the Court of Appeals might consider whether, under *Ashcraft v. Mattis*, ... U.S. ...., 52 L.Ed2d 219 (1977), there are constitutional barriers to the entry of declaratory relief to be an independent reason for a remand. This issue is not before the Court. In any event, there is not the slightest doubt that this is a live case and controversy in which declaratory judgment was entirely proper.

Before the District Court, Petitioners moved to dismiss on the ground, *inter alia*, that there was no continuing controversy. The District Court denied that motion. App. 3. The District Court was plainly correct. Respondents had alleged that Petitioners intended in the future to conduct similar searches (App. 28, at ¶ XXVI) and that they had sought from Petitioners but were refused assurance that the *Daily* search would not be repeated. (App. 27, at ¶¶ XXIV, XXV). Respondents further alleged (App. 28, at ¶ XXVII), and offered uncontradicted evidence to prove (App. 57-147), especially at 76-77, 78-79, 87-89, 133-35, 143-47) that the search of the *Daily* and the threat of its repetition has caused a present and continuing impairment of its ability to gather and report the news. Thus the District Court properly concluded that the *Daily* sought relief as a consequence of an uncontradicted showing that acts of Petitioners caused it present and continuing injury.

First, although the Government suggests that "the primarily factual nature of such a determination" (*id.*) makes that course appropriate, it does not suggest what that inquiry ought to be. There is a reference to determining the "precise details of the search itself" (*id.*, at n. 16), but that would be irrelevant to a determination of either whether the magistrate should have imposed "necessary restrictions" or whether any "search should have been permitted at all." The minor factual quibbles between the parties—such as whether the search lasted 15 minutes or 45—are inconsequential.

Second, the essential facts are genuinely undisputed. *Compare* Bergna Brief at 9-10 and Zurcher Brief at 10 *with* Resp. Brief, at 2-3. The details of the search are painstakingly set out in affidavits submitted by both sides which, at least as to the circumstances of the search, do not differ in any material respect. See App. 72-75, 130-32, 136-41, 155-69.

Third, a search pursuant to warrant cannot be sustained on the basis of grounds not submitted under oath to the magistrate. *See, e.g., Whiteley v. Warden*, 401 U.S. 460, 564-66 & n.8 (1971); *Spinelli v. United States*, 393 U.S. 410, 413 n.3 (1969); *Aguilar v. Texas*, 378 U.S. 108, 109 n.1, 111-15 (1964); *Giordenello v. United States*, 357 U.S. 480, 486-87 (1958); *Nathanson v. United*

States, 290 U.S. 41, 46-47 (1933). Indeed, under California law, material not presented to the magistrate, or not submitted under oath, may not be considered. *See* Calif. Pen. Code § 1526; *Theodor v. Superior Court,* 8 Cal. 3d 77, 87 & n.5, 104 Cal. Rptr. 226, 501 P.2d 234 (1972).

Fourth, although the question of whether summary judgment was properly granted was raised by Petitioners in the Court of Appeals, it was not included among the issues as to which review was sought in this Court. It is therefore not an issue now before the Court.

Fifth, two courts have found the search in this case to be unreasonable. The litigation has been pending for seven years. If this Court finds the record insufficient for the resolution of the question of reasonableness, it would be appropriate to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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